

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 3RD DECEMBER 2007 / 12TH AGRAHAYANA 1929

WP(C).No. 35722 of 2007(C)

**AGAINST THE ORDER IN IA 4761/2006 IN
OS.701/2003 of II ADDL.SUB COURT,ERNAKULAM**
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PETITIONER:

**MIRZA WAHEED, AGED ABOUT 55 YEARS,
VASANTHA NAGAR, OPPOSITE INTERNATIONAL STADIUM,
EDAPPALLY SOUTH VILLAGE, KANAYANNOOR TALUK,
ERNAKULAM DISTRICT.**

BY ADV. SRI.P.M.ZIRAJ

RESPONDENT:

**NARASIMHA PRABHU, S/O.LATE PURATHIKKATT
PADMANAABHA PRABHU, AGED 65 YEARS,
BUSINESS, T.D.ROAD, KOVILVATTOM DESOM,
ERNAKULAM, COCHIN-35.**

BY

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 03/12/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

KSS

M.N. KRISHNAN, J.

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W.P.C. NO. 35722 OF 2007

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Dated this the 3rd day of December, 2007.

J U D G M E N T

This writ petition is filed challenging the orders in I.A.4760/06 in I.A.4761/06 in O.S.701/03. By the said order the Court has allowed the prayers and the prayer in I.A.4761/06 is to set aside the exparte decree against the 3rd defendant and the prayer in the other I.A. is to condone the delay in filing the application. The Court was satisfied that the 3rd defendant was not served with proper notice. But, ultimately found that there was laches on other defendants and allowed the applications and set aside the exparte decree on payment of cost of Rs.10,000/-. It is challenging that order this writ petition is preferred.

2. If there is no direct service of summons on the defendant in a suit I feel the imposition of such a heavy costs is unjust. The trial court while awarding costs has to use its judicial discretion and therefore I find the imposition of costs

of Rs.10,000/- is really exorbitant. If there was laches on the 2nd defendant the Court should have ordered costs against that person and not to a person who has not been served with summons. Further the Court below has not considered the aspect whether the exparte decree in toto to be set aside or it has to be set aside only against defendants 2 and 3 especially I am told that the suit is one for specific performance of a contract. Therefore, the order under challenge is set aside and the writ petition is disposed of as follows.

(1) The Court below shall reduce the costs for setting aside the exparte decree, especially against the 3rd defendant who has not been served with notice.

(2) Even against 2nd defendant the costs appears to be very high and that has to be reduced.

(3) The Court may also make it very clear that whether it is necessary to set aside the exparte decree against all or whether it is sufficient to set aside the exparte

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decree against D2 and D3 and proceed with the case in accordance with law.

The writ petition is disposed of accordingly.

M.N. KRISHNAN, JUDGE.

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